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In the Supreme Court of the United States

OCTOBER TERM 1981

TRUMAN K. GIBSON, JR.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Was Gibson deprived of his liberty without due process of law because the State, in abuse of the grand jury process, obtained a grand jury indictment without presenting to the grand jury any evidence of criminal conduct by Gibson?

2. Was Gibson deprived of his right to the equal protection of the laws because the State deliberately chose to obtain criminal charges against him through the grand jury process, rather than affording Gibson the benefits of a preliminary hearing granted to other similarly situated individuals?

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PEOPLE OF THE STATE OF ILLINOIS,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner Truman K. Gibson, Jr., Defendant-Appellee in the court below, prays that a writ of certiorari issue to review a portion of the judgment entered in this case by the Supreme Court of Illinois.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The proceedings in the court below involved the claims of the People of the State of Illinois, as plaintiff-appellant, and of Forest P. Whitlow, Joseph P. Delfino and Truman K. Gibson as defendants-appellees. In a related case, the People of the State of Illinois was plaintiff-appellee and James Marando was the defendant-appellant. Only Truman K. Gibson and the People of the State of Illinois are parties to these proceedings.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois, *People* v. *Whitlow*, 89 Ill. 2d 322 (1982), is printed in Appendix 1. The opinion of the Illinois Appellate Court, Third District, *People* v. *Whitlow*, 86 Ill. App. 3d 858 (3rd Dist. 1980), is printed in Appendix 2.

JURISDICTION

The opinion and judgment of the Supreme Court of Illinois were entered on February 19, 1982. The petition for rehearing of the State of Illinois was denied on March 25, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Indictment

On May 21, 1976, a Rock Island County, Illinois grand jury returned a twelve count indictment against Truman K. Gibson, Jr., an attorney at law, and four other men, Joseph Delfino, Forest Whitlow, John Brewer and James Marando. A copy of the indictment is printed in Appendix 3.

Though the charges in the indictment are detailed and seemingly complex, they may be simply and briefly summarized. Essentially, each of the twelve counts charged that Gibson and his co-defendants sold stock in the Royal National Mortgage and Investment Company (hereinafter "Royal National") and that, in selling the stock, they made false statements and omitted to inform the prospective purchasers of material matters relating to the stock and the company.

Counts I through V of the indictment charged the defendants with conspiracy and substantive violations of the Illinois securities laws, Ill. Rev. Stat. Ch. 121½, §§ 137.12(F), (G) and (I) and 137.14, arising out of the sales of Royal National stock. Counts VI through XII charged Gibson and his co-defendants with conspiracy and theft by deception arising out of the same conduct, in violation of Ill. Rev. Stat. Ch. 38, § 16-1(b)(1).

B. Pre-Trial Proceedings

During pre trial discovery, Gibson secured a copy of the complete grand jury testimony of investigator Bernard Hoffman, the only witness who testified before the grand jury. Review of the twelve page transcript of Hoffman's testimony revealed that Hoffman did

not implicate Gibson in any criminal conduct.* Hoffman's entire testimony relating to Gibson was that (1) Gibson was an incorporator of Royal National, (2) Gibson was secretary-treasurer of the company, (3) Gibson received a salary of approximately $34,000 from Royal National, and (4) Gibson was paid an additional $25,000 by the company for Gibson's interest in an allegedly nonexistent corporation. *See* Appendix 4, at App. 78, 81 and 84. Based on this testimony alone, the grand jury returned its twelve count indictment.

Gibson filed a pre-trial motion to dismiss the indictment on the grounds that (1) no evidence of any criminality or wrongdoing by Gibson was presented to the grand jury and (2) Hoffman was incompetent to testify because he was not sworn as a witness. Gibson's motion to dismiss was denied by the trial court. Gibson then filed a pretrial motion in the Supreme Court of Illinois for leave to file a petition for a writ of mandamus. That motion was denied on December 2, 1976.

C. The Trial

The trial of this case, conducted before a jury in May, 1977, lasted almost three weeks. The report of the trial proceedings consumed some 1,500 pages. Despite Gibson's repeated requests for a severance, the trial commenced with five defendants. Finally, after almost three weeks of trial, the trial court agreed that defendant Marando's defense was antagonistic to that of Gibson and the other defendants. Marando's case was severed and he later entered a guilty plea.

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* The entire transcript of the grand jury proceeding is printed in Appendix 4.

Although the prosecution called more than twenty witnesses at trial, most of the witnesses did not even mention Mr. Gibson in their testimony. Not one of the seven victims of the thefts alleged in Counts VII through XII who testified during the State's case stated that Gibson was involved in the sale of Royal National stock to them. Gibson's counsel played almost no role in the cross-examination of the State's witnesses.

Despite the paucity of evidence against Gibson, the jury returned guilty verdicts on all twelve counts against him and the remaining co-defendants. Judgment was entered against Gibson and his co-defendants on five counts of theft by deception and four counts of violating various provisions of the Illinois securities laws.* Mr. Gibson was sentenced to concurrent sentences of one to three years in prison on each of the nine counts and was fined a total of $20,000; the three co-defendants received the same term of imprisonment as Gibson.

Following the entry of judgment against him, Gibson was suspended from the practice of law by the Supreme Court of Illinois. The suspension lasted almost three years, from January 20, 1978 to September 30, 1980. The suspension was vacated by the Supreme Court after the Illinois Appellate Court reversed Mr. Gibson's conviction.

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* The trial judge granted Gibson's motion to vacate and dismiss the judgments entered upon Counts I, VI and XII. The order dismissing Counts I and VI was pursuant to Ill. Rev. Stat. Ch. 38, § 8-5, which mandates that judgment not be entered on substantive counts as well as a conspiracy count. Count XII was dismissed because the trial judge found that the count did not properly allege an offense.

D. The Appeals

On direct appeal by the convicted defendants, the Illinois Appellate Court, Third District, reversed Gibson's conviction and remanded the case for a new trial because it found that the cumulative effect of the state prosecutor's persistent misconduct deprived Gibson of his right to a fair trial. *People* v. *Whitlow*, 86 Ill. App. 3d 858, 869 (3d Dist. 1980). *See* Appendix 2, at App. 40. The court found prosecutorial misconduct in the jury *voir dire*, the prosecutor's opening statement, his presentation of evidence and, particularly, his closing argument. Though the court noted that "the greater portion of the prosecutorial misconduct was directed solely at the defendant Gibson," 86 Ill. App. 3d at 869, Appendix 2, at App. 40, it found that the misconduct also prejudiced Whitlow, Delfino and Brewer. Consequently, their convictions also were reversed and remanded for a new trial. *Id.*

Having determined that a new trial was required, the Appellate Court addressed several other issues raised by Gibson in his appeal, including Gibson's argument that his conviction should be reversed outright, with no remand for a new trial, because the State abused the grand jury process by obtaining an indictment against Gibson without presenting any evidence to the grand jury of criminal conduct by him. Phrasing the issue as one merely challenging the sufficiency of the evidence in support of the indictment, the Appellate Court concluded that the grand jury process was not abused and held that "this appellate court district adheres to the rule that sufficiency of evidence presented to a grand jury is not listed among the grounds for dismissal set forth in section 114-1(a)(1-10) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, Ch. 38, par. 114-1(a)(1-10))." 86 Ill. App. 3d at 870, Appendix 2, at App. 42. The Appellate Court did

not address the fundamental constitutional issue raised by the facts of this case: when, as here, no evidence of criminal conduct by Gibson was presented to the grand jury, may the indictment stand?

The Supreme Court of Illinois affirmed the finding of the Appellate Court that the prosecutorial misconduct was so prejudicial to the defendants as to warrant a reversal of their convictions and a remand for a new trial. *People* v. *Whitlow*, 89 Ill. 2d 322, 341 (1982), Appendix 1, at App. 16. In addition, the Supreme Court upheld the Appellate Court's decision on the grand jury abuse question, noting that evidence of the defendants' illegal conduct could be inferred from the grand jury transcript and holding that a court should not inquire into the adequacy of grand jury evidence. 89 Ill. 2d at 331, Appendix 1, at App. 4. In reaching this decision, the Supreme Court linked the claims of defendants Gibson, Whitlow and Delfino together, failing to determine if the evidence against Gibson alone was sufficient to support his indictment.*

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* Applying the same form of analysis, the Supreme Court found the evidence presented at trial sufficient to support the jury's verdict. 89 Ill. 2d at 343, Appendix 1, at App. 17.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE IMPORTANT GRAND JURY QUESTION PRESENTED BY THIS CASE BECAUSE THE DECISION BY THE COURT BELOW IS CONTRARY TO CONSTITUTIONAL PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

INTRODUCTION

The sole issue presented in this petition is whether an indicted defendant is entitled to relief, for abuse of the grand jury process, when a State prosecutor obtains an indictment which is supported by *no* evidence of criminal conduct by the defendant. The question at issue here is one of first impression before this Court and, in light of the important due process and equal protection problems associated with an indictment supported by no evidence, is appropriate for review.

An examination of the testimony presented at the grand jury proceeding demonstrates that Gibson was indicted for numerous violations of the Illinois criminal law despite the fact that absolutely no evidence of any criminal conduct by him was presented to the grand jury. The State's sole witness before the grand jury, investigator Hoffman, referred to Gibson only four times during the course of his brief testimony, never implicating Gibson in any criminal acts. Indeed, Hoffman simply identified Gibson as an incorporator of Royal National, as secretary-treasurer of the company, and as the recipient of a salary from the company of approximately $34,000. *See* Appendix 4, at App. 78, 81. Hoffman also testified that Gibson was

paid an additional $25,000 for his interest in an allegedly non-existent corporation. *See* Appendix 4, at App. 84. Based on this testimony *and nothing more*, the grand jury's indictment charged Gibson with twelve violations of the criminal law.

The injustice caused Gibson as a result of his unsupported indictment becomes even more evident upon a review of the type of evidence that was *not* presented to the grand jury. For instance, no evidence was presented to the grand jury to indicate *in any way* that Gibson entered into an agreement with his co-defendants to violate the securities laws of Illinois as the indictment charged in Count 1. Count I charged twelve separate overt acts. No evidence was presented to the grand jury that any of the overt acts was committed. Gibson was named in three of these overt acts, but there was no basis in the grand jury proceedings for any of the allegations set forth in the overt acts.

Overt act number 8, for example, alleged that on June 11, 1973 defendants Whitlow, Delfino and Brewer signed Royal National check No. 1064 in the amount of $2,500 payable to Truman Gibson, but no evidence in support of this claim was presented to the grand jury. Overt act number 9 alleged that on July 30, 1973 defendants Whitlow and Brewer signed Royal National check No. 1134 in the amount of $5,000 payable to Truman Gibson. Again, the grand jury transcript was absolutely silent as to any evidentiary basis for this allegation. Finally, overt act number 12 alleged that Gibson and his co-defendants opened bank account number 617-441-9 at the Lake Shore Bank, but nothing in Mr. Hoffman's grand jury testimony supported this claim or any of the other alleged overt acts. There is simply no testimony or evidence of these matters

in the grand jury transcript. Yet, the grand jury allegedly found probable cause to believe that these events occurred and that they were in furtherance of a conspiracy.

Similarly, Counts II through V alleged various violations of the securities laws by Gibson, but nothing in Hoffman's grand jury testimony evidenced any violation of the securities laws by Gibson. Hoffman did not even state that Gibson had any knowledge as to the numerous means by which the stock was being sold. Finally, Hoffman presented no information to the grand jury which supported the theft by deception allegations in Counts VI through XII.

The instant case, therefore, presents this Court with one of the most extreme examples of the abuse of the grand jury process. Because it involves an indictment supported by no criminal conduct by the indicted defendant, the case demonstrates how easily the constitutional protections of due process can be violated during grand jury proceedings. In addition, the case illustrates how a State prosecutor, if given unbridled control over the grand jury process, can, in violation of the equal protection clause of the Fourteenth Amendment, discriminatorily choose to prosecute weak cases through the grand jury, and thereby deprive certain defendants, like Gibson, the benefits which a preliminary hearing affords to other similarly situated individuals. Accordingly, this petition provides an ideal case for the Court to consider what, if any, protections are to be given to the individual whose indictment is supported by *no* evidence of criminal conduct.

A.

THIS COURT SHOULD RESOLVE THE IMPORTANT QUESTION OF WHETHER AN INDICTMENT BASED UPON NO EVIDENCE OF CRIMINAL CONDUCT CONSTITUTES AN ABUSE OF THE GRAND JURY IN VIOLATION OF DUE PROCESS GUARANTEES.

In refusing to find an abuse of the grand jury process through the unsupported indictment returned against Gibson, the court below held that a trial court should not inquire into the adequacy of the evidence presented to a grand jury. *People* v. *Whitlow*, 89 Ill. 2d 322, 331 (1982). *See* Appendix 1, at App. 4. The court's ruling would not be subject to challenge if Gibson were merely contesting the sufficiency of the evidence presented to the grand jury. *See, e.g., Costello* v. *United States*, 350 U.S. 359, 363 (1956). Indeed, Gibson conceded in the courts below (and concedes here) that a grand jury indictment may be based on hearsay, *Costello* v. *United States, supra*, or on evidence that was illegally obtained. *United States* v. *Calandra*, 414 U.S. 338 (1974). Mr. Gibson does contend, however, that his indictment is invalid because it is not supported by any evidence of criminal conduct. Under these circumstances, the ruling of the Illinois Supreme Court is contrary to the generally accepted principles governing grand jury proceedings, as well as to holdings of the various federal courts which have considered this issue.

Historically, the primary function of the grand jury has been to determine if, based on the evidence presented by a prosecutor, probable cause exists that the alleged offender is guilty of the offense charged. In this regard, this Court has considered the grand jury to be:

> "[A] primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the

> invaluable function in our society of standing between the accuser and the accused, . . ., to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

Wood v. *Georgia*. 370 U.S. 375 390 (1962). Consistent with these general principles based upon the essential requirement of probable cause, a grand jury indictment can not be allowed to stand where there is *no* evidence to support it.

The Illinois Supreme Court's decision is in conflict with the decisions of numerous other courts which have held that an abuse of the grand jury process occurs when the State procures an indictment that is not supported by any evidence of criminal conduct. For example, in *United States* v. *Costello*, 221 F.2d 668, 677 (2d Cir. 1955), Judge Learned Hand articulated the rule that ". . . if it appeared that no evidence had been rationally established by the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." Judge Hand's view was formally adopted by Justice Burton who, in concurring in this Court's affirmance of the lower court's decision in *Costello*, noted that:

> "[I]f it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

Costello v. *United States*, 350 U.S. 359, 364 (1956) (Burton, J., concurring).

In *Brady* v. *United States*, 24 F.2d 405 (8th Cir. 1928), the court reversed a conviction for conspiracy to use the

mails in furtherance of a scheme to defraud. The reversal was ordered because there was no evidence presented to the grand jury of one element of the criminal charge. In *Brady*, the court found that there was no evidence before the grand jury that the defendants used the mails in executing the scheme to defraud, an essential element of the offense charged. Under these circumstances, the court held that the indictment must be quashed. As the court explained:

> "The doctrine that a grand jury may indict without evidence, if tolerated, would establish a precedent subversive of the liberty of the citizen, and his safety and security, and the good name and fame of any innocent person might at any time be blasted."

24 F.2d at 408 (quoting from *People* v. *Price*, 2 N.Y.S. 414, 416 (1878), *aff'd* 119 N.Y. 650 (1890)). While *Brady* merely involved a failure to present evidence on one element of the offense, in this case no evidence of any criminal conduct whatsoever was presented to the grand jury against Mr. Gibson. Accordingly, this case involves an even more serious due process violation than that which the court found to exist in *Brady*.

In *United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964), a court again ordered the dismissal of an indictment not supported by any evidence of criminal conduct. There, the only evidence presented to the grand jury resulted from illegal wiretapping and, once this evidence was suppressed, there existed no evidence of criminal conduct. In reaching its decision, the court stated the general principle, relied upon herein by the court below, that a defendant has no right to have an indictment dismissed merely because incompetent or inadequate evidence was presented to the grand jury. 329 F.2d at 853. However, the court recognized that a different issue is raised, permitting an indictment to be dismissed, when a defendant claims that

his indictment was supported by *no* evidence. As the court held:

> "As long as there is some competent evidence to sustain the charge issued by the Grand Jury, an indictment should not be dismissed. Here, the government concedes that the indictment rested almost exclusively on the testimony of (the informant) and that dismissal of the indictment was proper if (the informant's) testimony could not be used. In light of this concession, dismissal of the indictment could hardly be termed an abuse of discretion."

Id. at 853-54 (citations omitted).

In a case remarkably similar to the instant case, *United States* v. *O'Shea*, 447 F. Supp. 330 (S.D. Fla. 1978), the court dismissed an indictment for conspiracy to import marijuana because, based on its own independent review of the grand jury transcripts, it found no evidence of any criminal conduct by one of the named co-conspirators. In justifying its decision, the court, as did the court in *Tane*, recognized a distinction between a challenge to an indictment on the ground of insufficient or inadequate evidence, and one based on no evidence. 447 F. Supp. at 332. Acknowledging the grand jury's dual purpose of protecting the innocent accused and assuring indictments based on evidence of probable cause, the court stated that a trial court "must have the authority and power to inquire into and review the proceedings of a grand jury." *Id.* Otherwise, according to the court, the charge "to the grand jury as to its functions, duties and responsibilities would be worthless, indeed a judicial farce." *Id.* As the court concluded:

> "The grand jury is a great institution which has been the guardian of the people since it was created at Runnymede. Although there is abroad in this land today a movement for its elimination, it is the view of the

> undersigned that every possible effort should be made for its preservation. Those who favor its abolition argue that the prosecutor controls the grand jury; that he decides what the grand jury will hear, how much it will hear and when it will hear it; and that he decides the quantum as well as the quality of the evidence submitted for the grand jury's consideration; and in sum, that the prosecutor totally dominates and controls the Grand Jury. *If the Grand Jury system is to survive, its intended purpose must not be prostituted* (emphasis added).

Id.

Thus, the decision of the court below, finding no abuse of the grand jury process, is in conflict with decisions of other courts which have directly considered the issue. This Court should grant certiorari to resolve the question of whether an indictment should be dismissed when, in abuse of the grand jury process, it is supported by *no* evidence of criminal conduct against the indicted defendant.

B.

THIS COURT SHOULD RESOLVE THE IMPORTANT QUESTION OF WHETHER A PROSECUTOR'S DECISION TO OBTAIN CRIMINAL CHARGES OF A WEAK CASE THROUGH THE GRAND JURY PROCESS, RATHER THAN AFFORDING A POTENTIAL DEFENDANT THE BENEFITS OF A PRELIMINARY HEARING, VIOLATES EQUAL PROTECTION GUARANTEES.

In the court below, Gibson contended that his constitutional right to the equal protection of the laws was violated by the State's decision to obtain criminal charges against him through the restrictive grand jury process, rather than by proceeding through a preliminary hearing. Gibson argued that a preliminary hearing affords a potential defendant certain rights—such as the right to appear and argue no probable cause and the right to confront and

cross-examine witnesses—that are not provided by the grand jury process. Under these circumstances, Gibson claimed that it was an abuse of the grand jury process and a denial of equal protection for the prosecutor to have deliberately chosen to prosecute the extremely weak and unsupported case against him through the grand jury, rather than affording him the benefits of a preliminary hearing like other similarly situated individuals. The opinion of the court below does not address this issue; it is thus presumed that the court rejected Gibson's claims.

It generally has been held that a prosecutor has considerable discretion in deciding whether and in which forum to prosecute a potential criminal defendant. *Oyler* v. *Boles*, 368 U.S. 448 (1962). However, such prosecutorial discretion is not to be left unbridled and must be limited by constitutional protections. Indeed, a prosecutor may not base his decision to prosecute individuals on arbitrary and improper classifications. *See, e.g., United States* v. *Neary*, 552 F.2d 1188, 1195 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977); *United States* v. *Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975); *United States* v. *Berrigan*, 482 F.2d 171, 174 (3d Cir. 1973).

Allowing a prosecutor unfettered discretion to prosecute inherently weak cases against certain individuals, like Gibson, through the restrictive grand jury process, rather than affording them the benefits provided similarly situated individuals at preliminary hearing, unconstitutionally subjects the certain individuals to the whim of the prosecutor, denying them their right to equal protection under the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *United States* v. *Falk*, 479 F.2d 616, 624 (7th Cir. 1973). Gibson has suffered such a deprivation of his equal protection rights by the indictment obtained against him in this case.

Mr. Gibson has been under the cloud of an unsupported indictment for over six years. He was suspended from the practice of law for almost three years. Now, he is faced with the prospect of a new trial on an indictment which is not supported by any evidence of criminal conduct by him. In view of the important constitutional question raised herein, this Court should grant certiorari in this case.

CONCLUSION

For all of the reasons stated herein, petitioner Truman K. Gibson, Jr. respectfully prays that this Court grant a writ of certiorari to review a portion of the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

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